

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

13-P-1923

COMMONWEALTH

vs.

KRISTOPHER M. CORMIER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This matter is before us on the defendant's interlocutory appeal from an order by a judge of the Fitchburg District Court denying his motion to suppress evidence of his breathalyzer (breath) test results at his trial on the charge of operating under the influence of intoxicating liquor (OUI). The defendant asserts on appeal, as he did below, that the Office of Alcohol Testing (OAT) was in noncompliance with regulations that required it to create and maintain a breath test operator's manual. He contends its violation of these rules renders the test results inadmissible. Concluding otherwise, we affirm.

Background. The defendant was arrested and charged with OUI and speeding on February 5, 2012. He agreed to take the breathalyzer test, the results of which read above the statutory limit for alcohol consumption while driving. The judge allowed

the defendant's request for the discovery of the breathalyzer operating manual. The OAT did not respond to the Commonwealth's or Cormier's attempts to obtain the manual, and the judge initially allowed the motion. However, upon the Commonwealth's motion for reconsideration, the judge ordered an evidentiary hearing at which the OAT supervisor testified. In a written memorandum of decision denying the defendant's motion to suppress, the judge ruled that the failure of the OAT to create and maintain an operator's manual did not prejudice the defendant. A single justice of the Supreme Judicial Court granted the defendant's application for leave to prosecute an interlocutory appeal from the denial of his motion to suppress, see Mass.R.Crim.P. 15(a)(2), as appearing in 422 Mass. 1501 (1996), and transferred the matter to this court.¹

Background. During discovery, the defendant requested a copy of the breath test operator's manual for the Draeger Alcotest 9510 breath test machine (9510).² When the OAT

¹ The motion filed in the District Court was denominated "Motion to Exclude Breath Test Evidence" and sought relief on both grounds of noncompliance with regulations and as a discovery sanction. The defendant sought an interlocutory appeal "based on the denial of his Motion to Suppress," and the appeal was granted on that basis.

²Although it is not entirely clear from the record that the machine used to test the defendant's breath was a Draeger Alcotest 9510, because the defendant directed his inquiry to that machine and the Commonwealth states in its brief, without objection from the defendant, that the machine at issue is the 9510, we proceed on that basis. Moreover, because it appears

responded that that "no manual exists," the defendant moved to exclude the breath test, arguing that the OAT had not complied with 501 Code Mass. Regs. § 2.04(f), which states that the OAT "shall be responsible for . . . creating and maintaining the Breath Test Operator's Manual."

On November 28, 2012, an evidentiary hearing was held on the defendant's motion. Barbara O'Brien, the OAT supervisor, was the only witness called. She testified that the 9510 was a new machine that had been introduced in the Commonwealth in a 2011 pilot program and, further, that as of the date of the hearing it was in use throughout Massachusetts. O'Brien explained that the 9510, like previous breath test machines, consists of two general components. The first component constitutes the "inner workings" of the machine based on the science behind measuring blood alcohol content through a breath sample. This information is not available in a manual because of the manufacturer's propriety interest in the technology. The second component relates to the "State-specific software" that must be installed on the machine because of the different requirements for breath testing that exist across the country. O'Brien acknowledged that the manufacturer and other States may

that the breath test machine that preceded the 9510 had a printed operator's manual, we assume that no issue would be presented had that machine been used. See affidavit of Albert A. Elian, attached to the Commonwealth's motion to expand the record on appeal.

have operator manuals relating to State-specific requirements and that some of these manuals can be seen online, but she made clear that these manuals are not accurate for Massachusetts because of the specific requirements unique to Massachusetts.³

O'Brien further explained that a manual had been produced for past machines, but that changes to the State-specific software were so frequent and numerous that the manuals were quickly outdated.⁴ In response to this problem, the OAT created reference materials in a PowerPoint computer presentation that is used during an eight-hour course to train breath test operators on the 9510. O'Brien stated that these materials were developed in order to facilitate integration of changes and updates "so the officers in the field are not confused when they are trying to administer a breath test."

The motion judge ruled that the OAT had failed to comply with its own regulation requiring that it create and maintain a breath test operating manual but, determining that the defendant

³ The term "manuals" was somewhat confusingly referenced during the hearing without clearly distinguishing between those directed to the workings of the breath test machine versus an "operator's manual," as is at issue in the regulations. O'Brien illustrated the difference by comparing the situation to purchasing a digital video disc (DVD) player, where the consumer would not expect a manual about how the player functions, but rather about how to operate it.

⁴ Decisional law is replete with references to the earlier manual that had been in circulation since 1987. See generally Commonwealth v. Zeininger, 459 Mass. 775, 780 (2011); Commonwealth v. Kelley, 39 Mass. App. 448, 450 (1995); Commonwealth v. Hourican, 85 Mass. App. Ct. 408, 413 n.5 (2014).

failed to establish any prejudice, declined to exclude the breath test results.⁵

Discussion. "The Legislature has charged the Secretary of the Executive Office of Public Safety and Security (Secretary) with promulgating rules and regulations regarding satisfactory methods, techniques and criteria for the conduct of breathalyzer tests. For a breathalyzer test result to be valid and admissible in evidence, the Commonwealth must demonstrate compliance with those regulations that go to the accuracy of the [breath testing] device or manner in which the [breathalyzer] test was performed." Commonwealth v. Hourican, 85 Mass. App. Ct. 408, 411 (2014) (internal citations and quotations omitted).

The regulations are set forth in 501 Code Mass. Regs. § 2.00 et seq. (2010). The specific regulation at issue in this case appears in § 2.04, entitled "Responsibilities of the Office of Alcohol Testing." That section grants authority to the OAT to perform tasks associated with breath testing, such as maintaining a list of approved machines, certifying the machines, establishing training standards and training officers, as well as "creating and maintaining the Breath Test Operator's

⁵ However, the judge ordered the OAT to produce a manual, and OAT complied with that order on March 27, 2013. See affidavit of Albert A. Elian, attached to the Commonwealth's motion to expand the record on appeal.

Manual." The section grants authority over these tasks, but does not dictate their performance.

For example, the language in the heading of the section, and repeated in the first sentence, merely sets forth that which the OAT "shall be responsible for"; it does not dictate that it "shall perform" those tasks, rather, that directive appears in later sections. In addition, § 2.04 appears immediately after the sections on purpose and definitions, further suggesting it is intended more for informational purposes than to mandate action.

The sections that follow mandate action. Specifically, § 2.05 states that "[t]he Director shall establish and maintain" a list of breath test devices; section 2.06 reads that OAT "shall certify all breath test devices"; section 2.07 provides that "[t]he Director shall establish a uniform statewide training and certification program for [breath test operators]" (emphases added). Notably, there is no concomitant regulation that the OAT "shall" create and maintain a breath test operator's manual.

In context, therefore, the regulation at issue appears to provide that if a manual is to be created, the OAT is charged with that responsibility, rather than any other agency.

See Commonwealth v. Hourican, 85 Mass. App. Ct at 410-411

("Language in a regulation, like language in a statute, must be

considered in light of the other words surrounding it, and its scope and meaning must be determined by reference to context"). This conclusion is buttressed by the language in an earlier regulation for the administration of the breath test, 501 Code Mass. Regs. § 2.56 (1994), that read: "The breath test shall be administered in accordance with the Operational Procedure checklist for the breath testing device in question that is contained in the Infrared Breath Testing Operator's Manual prepared by the Office of Alcohol testing." That section is no longer in effect. See now 501 Code Mass. Regs. § 2.14 (2010). There is no longer any reference to the operator's manual in the sections mandating that specific tasks be accomplished.

In accordance with this interpretation of the regulations, we do not view the OAT as noncompliant with the regulation.

Even if we were to interpret the regulation as requiring the OAT to create and maintain a manual, the defendant would not be entitled to relief. The regulations' enabling statute, G. L. c. 90, § 24K, requires only that a valid breath test analysis be performed by a certified operator, using a certified breath testing device in accordance with methods approved by the Secretary of Public Safety, which involves two breath samples and one calibration standard analysis. See also 501 Code Mass. Regs. § 2.13 (2010). If these requirements are met the breath

test results "shall be . . . admissible" and the requirements are silent as to the requirement of an operators' manual. Ibid.

There is no dispute on this record⁶ that the breath test was performed by a certified operator and conducted on a conforming device in a manner that comported with approved methods. The sole claim relates to the lack of a breath test operator's manual. Because the defendant has failed to show how the lack of such a manual affected the accuracy of the device or the manner in which the test was performed, this minor deviation does not warrant relief. See Commonwealth v. Kelley, 39 Mass. 448, 453 (1995) (minor deviation from regulations that do not affect the accuracy of the method of the testing go only to the weight of the evidence not its admissibility); see also Commonwealth v. Hourican, 85 Mass. at 411.

Moreover, the undisputed evidence shows that the reference materials developed by OAT and utilized in the PowerPoint presentation given during the eight-hour operator training session served in lieu of a manual, if not as a manual. The defendant makes no credible contention that that training was inadequate, and without more, there is no basis upon which to

⁶ This appeal presents no issue whether the machine used to test the defendant was properly calibrated under Massachusetts standards.

conclude that the lack of printed manual rendered it so.

Order denying motion to
suppress breath test
affirmed.

By the Court (Cohen, Carhart
& Maldonado, JJ.⁷),

Clerk

Entered: May 20, 2015.

⁷ The panelists are listed in order of seniority.